

FIU Law Review

Volume 9 | Number 1

Article 3

Fall 2013

Fish on Academic Freedom: A Merited Assault on Nonsense, But Perhaps a Bridge Too Far

Lawrence Alexander

University of San Diego School of Law

Follow this and additional works at: <https://ecollections.law.fiu.edu/lawreview>



Part of the [Other Law Commons](#)

Online ISSN: 2643-7759

Recommended Citation

Lawrence Alexander, *Fish on Academic Freedom: A Merited Assault on Nonsense, But Perhaps a Bridge Too Far*, 9 FIU L. Rev. 1 (2013).

Available at: <https://ecollections.law.fiu.edu/lawreview/vol9/iss1/3>

This Article is brought to you for free and open access by eCollections. It has been accepted for inclusion in FIU Law Review by an authorized editor of eCollections. For more information, please contact lisdavis@fiu.edu.

Fish on Academic Freedom: A Merited Assault on Nonsense, But Perhaps a Bridge Too Far

*Lawrence Alexander**

In *Versions of Academic Freedom: From Professionalism to Revolution*, Stanley Fish turns his prodigious intellectual and rhetorical skills to debunking various inflated views of academic freedom and defending a narrow, professional account of it. Academic freedom is freedom possessed by the members of university and college departments that is not granted to those outside the ivory towers. For Fish, that freedom should rightly only extend to academics in the course of teaching, researching, and publishing in accordance with the standards of their academic disciplines. Beyond that, academics are merely employees and citizens, with no privileges other than those possessed by other employees and citizens.

Given Fish's thesis, my job as a commentator is a difficult one. A commentator is supposed to poke holes in the arguments of his target. He is supposed to criticize, not laud. I, however, agree with Fish, not only with his basic thesis, but also with his supporting arguments. In short, I'm stuck with "I couldn't have said it better myself."

Nevertheless, there are perhaps a few jots and tittles in Fish's arguments that I can object to or at least query. I think Fish at times forgets how completely inert the postmodern critique is, a point he otherwise recognizes. And I think Fish, in attempting to hermetically seal off the academy from external justification, has taken his argument farther than it needs to be taken to secure his account of the academy and its freedom. (That's the "bridge too far" of my title.)

THE FISH VIEW OF ACADEMIC FREEDOM

What is the role of an academic such that there is a tenable claim to a freedom not possessed by others? Fish distinguishes five different "schools" of conceptions of that role. The first is the "it's just a job" school. The academic's job is to acquire and propagate knowledge according to disciplinary norms. His is a profession in which competence is judged by standards internal to the profession. Academic freedom is nothing more than the freedom necessary for doing the academic's job.

The second school of conceptions of the academic role is that of

* Warren Distinguished Professor of Law, University of San Diego School of Law.

serving the common good. The academic performs this role criticizing public opinion and promoting freedom, justice, and democracy.

The third school is that of academic exceptionalism. Because they serve the common good, academics are exceptional beings who deserve special privileges.

The fourth school views the academic role as critique. That is, academics must not only serve the common good. They must also turn inward and criticize the norms of their disciplines, exposing the historical, political, cultural, racial, etc. biases which underlie those norms.

The fifth school views the academic as a revolutionary. Academics must be the vanguard of a revolt against the corrupt, oppressive, and unjust regime that is reflected in all the institutions of society, including the university and its disciplines.

Fish endorses the first, the “it’s just a job,” conception of the academic role. Being an academic is being a member of a profession that has its own standards of competence and that provides a service that others value sufficiently to sustain that profession. And academic freedom is the freedom of the profession to set its own standards and to judge competence and shoddiness thereby. It is a freedom that is limited to academic matters: for example, is so and so a competent historian and teacher, and are the claims his book on the American founding based on sufficient evidence and the most warranted inferences? When the academic acts outside of these disciplinary roles, as a university employee or as a citizen, he warrants no more freedom and immunity than other, non-academic, employees and citizens. Academic freedom stops, so to speak, at the discipline’s edge.

I wholeheartedly agree with Fish on the “it’s just a job” point and its important, but limited, implications for academic freedom. Indeed, I argued as much in an article written several years ago:

If academic freedom is not some legal right derived from the First Amendment, what is it, and what is its importance? To put it succinctly, academic freedom is that freedom from fear of job reprisals that is necessary for academics to function as academics. As such, it is a privilege of academics that carries with it a responsibility, namely to act as academics.

What is it then to act as an academic? It is, first and foremost, to follow arguments and evidence where they lead without regard to whether they will support one’s political goals or enhance one’s popularity or reputation. The true academic is an advocate only for his arguments and evidence. He is the antithesis of those who know the conclusions they wish to reach and cast about for only those arguments

2013] *A Merited Assault on Nonsense, But Perhaps a Bridge Too Far* 3

and that evidence that can be marshalled in support of those conclusions.¹

Given this view of academic role and academic freedom that Fish and I share, it follows that the First Amendment offers academics no protection that is not offered non-academics. It does not immunize academics from otherwise valid content-neutral restrictions, even when those restrictions impede academic work. Academics can be validly required to receive the consent of subjects of experiments even if apprising the subjects undermines the scholarly goal. Academics may be validly prohibited from killing people or having sex with minors, even if these prohibitions foreclose access to knowledge. Academics can be validly prohibited from stealing others' computers or lab equipment, again, even if those prohibitions impede their research. And what goes for content-neutral restrictions goes for content-based ones as well. Academics may not infringe others' copyrights in producing scholarship, nor is what they publish or say in class immunized from defamation suits.

In terms of the First Amendment, then, the position of academics is not different from that of non-academics. Academics are in a position vis-à-vis the First Amendment similar to that of members of the press. The freedom of speech the press possesses is the same freedom others possess. Moreover, I believe the absence of special free speech privileges for the press and for academics is a good thing for both. For special speech privileges granted by government—and courts are part of the government—would inevitably bring in their wake governmental intervention into determining who is a bona fide academic or member of the press and acting as an academic or in the role of the press. Moreover, the special privileges would likely as well bring government-imposed responsibilities that could distort the proper functioning of academics and the press.

So the absence of special First Amendment privileges for academics is a blessing, not a curse, for the academic enterprise. So, too, I believe is the absence of special employee privileges for academics, either to engage in the non-academic managerial decision making of the university employer or to criticize the university's non-academic decisions with impunity. A philosophy professor may have views about recruiting students, raising money, and configuring classrooms, but those views do not come from the discipline of philosophy and are therefore outside the ambit of academic freedom, no matter how wise they are. Fish is correct in concluding that academic freedom does not license a professor's rejecting the assigned text for a multi-sectioned course, but it does license him to write a scholarly critique of that text or of multi-sectioning of courses, etc.

¹ Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883, 884 (2006).

Let me turn now to disciplinary standards, the adherence to which defines the academic role as opposed to other roles. Those standards come into play when academics assess their students and when they participate in hiring decisions, promotion and tenure decisions, and in assessments of the work of scholars at other universities. Now those standards can be stated at a level of generality at which all competent members of the discipline will agree. When it comes down to particular cases, however, those standards do not provide algorithms, and disagreements about quality within the discipline are to be expected. The line between arguments made by other academics or by students with which I disagree, and those that I find to be incompetent, is not a bright line. There are positions with which I disagree that I admit are clearly competently (if not convincingly) supported, and there are positions that are clearly beyond the pale. In between these polar cases is a middle ground where one should expect disagreement about competence among competent academics.

Now, Fish recognizes that one's academic works and assessments can never be totally insulated from one's background and partisan views. Nevertheless, well-trained academics are capable of suppressing their biases in their academic work, if not totally, then to a great extent.

Fish is at his best when he addresses the postmodern critique of disciplinary standards. His principal illustrative foil is Judith Butler. Butler objects to the self-certifying nature of disciplinary norms. She makes the standard postmodern move in pointing out the cultural, linguistic, and other contingencies that produce such norms. She thinks, incorrectly, that this insight both discredits the disciplinary norms and that it licenses academics to use their positions as platforms for political advocacy.

Fish disagrees with Butler on both points. On the latter, the political advocacy point, Fish points out that having Butler and other lefties using their academic positions to advance their political views provides grist for conservatives like David Horowitz to urge that academic departments be more politically balanced—i.e., that conservative academics be hired in greater numbers. I agree with Fish that this is the wrong cure for the Butler disease; though I sympathize with conservative critics of the striking political imbalance in the academy because of the abuse of the academic role that so many lefties, like Butler, are guilty of, not only in what they teach and write, but also in their hiring and tenure decisions. Still, like Fish, I think the political balance remedy amounts to throwing in the towel and conceding that politics is a legitimate academic pursuit. (For the same reason, I oppose affirmative action in faculty hiring. Whether it's hiring conservatives for ideological balance or hiring blacks, Hispanics, or women for "diversity," using non-academic criteria in decisions that should be made solely based on disciplinary standards, is a terrible idea. Behind it

2013] *A Merited Assault on Nonsense, But Perhaps a Bridge Too Far* 5

lies the “save the world” conception of the role that Fish and I both reject.)

Does the postmodern critique discredit the disciplinary standards so central to Fish’s and my view of academic freedom? Not in the least. To explain, allow me to digress for a moment and recapitulate points that I made in my earlier pieces on academic freedom.

Most disciplines worthy of being called disciplines and represented in universities are concerned with claims that fall into one of three large categories. The largest category is that of descriptive claims—claims about the past, the present, and the future. Descriptive claims in the hard sciences come in all three varieties. In the social sciences, historians in history, political science, sociology, and economics departments make claims about the past. Sociologists, political scientists, and economists make claims about the present and provide models for predicting the future. There are well-established criteria for determining whether their evidence and arguments satisfy disciplinary standards. (If there are not, then the discipline is not in fact a discipline.) Natural and social scientific claims should be assessable with respect to whether they meet appropriate standards of argument and evidence without regard to the assessor’s political sympathies.

There are other disciplines within the university whose knowledge claims are not descriptive of the past, present, or future. Normative claims are a branch of philosophy, and there are well-established disciplinary standards for assessing such claims that do not depend on one’s normative commitments, or at least not on one’s superficial normative commitments. John Rawls and Robert Nozick were both fine normative philosophers, worthy of their Harvard appointments, but they disagreed considerably over what is just. Nonetheless, despite those disagreements, each could recognize the other’s academic merits.

[Then] . . . there are conceptual knowledge claims that make up a considerable amount of what philosophers do and are the staple of logicians and mathematicians.²

Finally, there is a fourth form of disciplinary knowledge, one that is emblematic of literary analysis and criticism: “interpretive” knowledge.

Interpretive claims offer themselves as bases for understanding works of literature and art that are not reducible to straightforward factual claims, like what authors intended, or to straightforward value claims. Interpretive claims present the literary or artistic work as a window through which to view basic truths about the human condition—its ambitions, foibles, tragedies, glories, virtues, and vices. A good

² *Id.* at 885.

interpretation or analysis guides the audience to the most perspicuous window the interpreted work makes available. Moreover, there is a real discipline involved here. There are real standards for what counts as a good or bad critical analysis. It is not just *de gustibus*.³

Having described the various academic disciplines and their basic methodologies, how does the postmodern critique of the disciplines offered by Judith Butler and her ilk fare? That critique, recall, is that all criteria for measuring academic merit are socially constructed, and socially constructed primarily by white heterosexual males to preserve their power and privilege. They are nothing but Europhallogocentric tools to oppress minorities and women.

That the way the “social construction of standards of merit” is bandied about in today’s academic culture is absolute philosophical rubbish is a point about which I hope I can be brief. There is, indeed, a quite respectable philosophical argument going back to Kant that our very perceptions of the external world are structured by categories of thought. Kant believed these categories were fixed; whereas after Kant, Hegel and his successors deemed the categories to be products of culture and its linguistic accretions. Kant also believed that behind the constructed phenomenal world lay the noumenal world of things-in-themselves. Kant’s continental descendants, however, dispensed with the noumenal world: the socially constructed phenomenal world is all there is. Postmodernism is the heir to this philosophical tradition rejecting foundational claims about the nature of reality and proclaiming reality to be the product of categorization that is socially and historically contingent.

The postmodern view, like all thoroughgoing skeptical views about knowledge, is ultimately self-undermining. Like the claims to knowledge it debunks, it also purports to know something about the world. Moreover, its view that our categories are socially constructed is an “is” from which absolutely no “ought” follows. The postmodern view surely does not entail the claim that we cannot transcend our cultural categories. Rather, it merely entails the claim that, like the rebuilding of Neurath’s boat at sea, transcending our cultural categories is something we cannot do all at once and that when we do it, we will be using the tools our culture provides us for its own transcendence. Ultimately, the postmodern emphases on social construction, perspectivalism, and the ubiquity of “interpretation” should be no more paralyzing in the normative, literary, and social

³ *Id.* at 896-97.

2013] *A Merited Assault on Nonsense, But Perhaps a Bridge Too Far* 7

scientific domains than in the hard sciences. As Thomas Nagel has insightfully argued, although we can never fully attain a “view from nowhere,” we can do better or worse in approaching such a perspective, both in scientific and normative matters.

The most sophisticated postmodernists, however, realize that nothing substantive, and surely nothing normative, follows from the postmodern point of view. Tell me over and over again that my thought that it is morally wrong to torture children for sadistic pleasure is socially constructed—a product of my time, place, language, or whatever—and you will not make even a dent in my belief that the view is correct. Tell me that the law of gravity is a social construction, and I will still not walk out my fourth floor window. (Nor, I might add, will any postmodernists I know. Neither they nor their insurance companies are postmodernists in their non-philosophic lives, nor could they be. That is my point.) Stanley Fish, an icon for many of the academic postmodernists who believe that the postmodern insight should topple the standards of merit and criticism that I deem definitive of the academic enterprise that merits academic freedom, himself understands that nothing—absolutely nothing—follows from his postmodernism. He understands, as most of his fellow travelers do not, that in recruiting postmodernism in its battle to dethrone the reigning standards, the identity politics crowd has enlisted an unarmed soldier. In a world where everything is point of view, reducing a position to a point of view cannot be a criticism of it, nor can it be a reason for its holders to abandon it. There is no post-modern escape hatch for the identity politics crowd when it is subjected to ordinary disciplinary standards of evidence and logical argument.⁴

So much for the postmodern critique. Fish, I am sure, agrees with my analysis of the postmodern critique, namely, that it is normatively inert.⁵ What is true about it is banal, and what is not banal about it is confused.⁶

What, then, about the “problem” that disciplinary standards freeze out all challenges to those standards, even if some of these challenges are merited? Fish, in responding to this criticism of disciplinary standards,

⁴ *Id.* at 892-93.

⁵ I am sure he agrees because he has said so. Why Fish embraces Richard Rorty’s deflationary view of historians’ facts puzzles me, however. If there is a reality of present events, then there is a reality of past ones. And I, perhaps naively, believe historians are attempting to convey to their audience that past reality. If I were Fish, I would exorcise the postmodern remnant suggested by the Rorty reference.

⁶ As I put it in another article, those “who enlist postmodernism to attack established norms have drafted an unarmed soldier.” Larry Alexander, *What We Do, and Why We Do It*, 45 STANF. L. REV. 1885, 1897 (1993).

correctly notes that whether these challenges *are* merited performance must be judged by the standards themselves. This, however, does not foreclose change. The standards may authorize their own alteration. Einstein replaced Newton because the Newtonian calculations proved inadequate by their own lights. That is how disciplinary change can and should occur. Fish quotes Judith Thomson, who argues that “new fields, indeed new ideas generally, have the burden of proof.”⁷ Indeed, to abandon our disciplinary standards in assessing challenges thereto is psychologically impossible individually and catastrophically anarchic institutionally. Where everyone is an academic, no one is.

Having agreed with Fish to this point, let me now demur to his attempt to discredit Robert Post’s view that academic freedom serves the goal of producing a better informed democratic citizenry and, more generally, the view that academic freedom serves external goals. That is the “bridge too far” that I find in Fish’s otherwise justified assault on the politicization of the academy.

Fish is correct that academic work need not be intended to produce goods extrinsic to disciplinary knowledge. Proving Fermat’s theorem is an endeavor worthy of mathematicians even if it has no practical payoff. So, too, with a historian’s history of England in the early Middle Ages, or an English professor’s interpretation of *Paradise Lost*.

Nonetheless, good academic work, even if not guided by extrinsic goals, does produce things of immense benefit to the world beyond the academy. A better informed citizenry is one byproduct. But so, too, are better rocket ships and mousetraps, hardier crops, faster computers, heightened aesthetic sensibilities, and more agile analytical minds.

Indeed, if the academy did not serve these external goals, even if indirectly as byproducts of academic work, there would be no reason for the rest of society to support the academic enterprise. Why should others spend scarce resources on activities that are only of benefit to those who engage in them? Again, to say that the academy must produce valuable goods for others is not to say that producing such goods should guide academic inquiry. On this point, Fish is correct. But one can serve a goal without being guided by it; and in the case of academic disciplines, one can best produce these extrinsic goods if one is *not* guided by the aim of producing them. The argument is an indirect consequentialist one, but it is nevertheless consequentialist. And Fish should embrace it. In the end, his salary depends on others’ belief in it.

⁷ STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION (forthcoming 2014) (manuscript at 44) (on file with FIU Law Review) (citing Judith Jarvis Thompson, *Ideology And Faculty Selection*, LAW & CONTEMP. PROBS., Summer 1990, at 160).